CHAPTER 14

WRITTEN AND DOCUMENT DISCOVERY

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CHAPTER 14

WRITTEN AND DOCUMENT DISCOVERY

I. INTRODUCTION.

A. Discovery Goals. To obtain what you need to resolve a case as quickly as possible with minimal investment of time and money, and to understand what you are required to provide offerors and contractors during the litigation process.

B. Learning Objectives.

1. The student will understand how FOIA and discovery standards compare.

2. The student will understand the importance of a Discovery Plan.

3. The student will understand the basic written discovery tools used in litigation.

II. GENERAL CONSIDERATIONS.

A. Obtaining information other than through discovery.

1. Freedom of Information Act (FOIA) (5 U.S.C. § 552).

a. Contractors can obtain information through a FOIA request. ABA Electromechanical Systems, Inc., NASA BCA No. 1081-13, 83-1 BCA ¶ 16,440 (appellant may use both FOIA and discovery procedures to obtain information) **Practice Tip:** Do not treat FOIA request any differently because it occurs during or in advance of litigation.

b. The FOIA is not intended to supplement or displace the rules of discovery. John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989).

c. As a general notion, information available under the FOIA is likely available through discovery. Culinary Foods, Inc. v. Raychem Corp., 150 F.R.D. 122 (N.D. Ill. 1993).

d. Information unavailable under the FOIA is not necessarily unavailable through discovery. Culinary Foods, Inc. v. Raychem Corp., supra.

(1) Under FOIA, the requesting party's need for the information is irrelevant.

(2) When a privilege is asserted under discovery, the litigant's need for the information is an important factor.

(3) Where discovery privileges are paralleled by certain FOIA exemptions, the balancing test weighing the litigant's need for information against the government's interest in confidentiality should be combined with the policies underlying the FOIA exemption. ACLU v. Brown, 609 F. 2d 277 (7th Cir. 1979).

e. Courts and Boards exercising jurisdiction under the Contract Disputes Act (as well as the GAO under the Competition in Contracting Act) do not have authority to resolve FOIA disputes. Bay Area Crane - Hoist Company, Inc., NASA BCA No. 387-7, 87-2 BCA ¶ 19,828 (despite allegation that a FOIA request violated the Board's discovery order, the Board declined to issue a protective order or impose sanctions because FOIA is not a discovery procedure within the Board's jurisdiction).

f. The Government must process FOIA requests, even during litigation. Rights under the FOIA are neither increased nor diminished because the requester is a party to litigation. National Presto Industries, Inc. v. U.S., 218 Ct. Cl. 696 (1978).

g. Local attorneys and trial attorneys must be cognizant of the FOIA requests and responses. To the extent appellant has already received documents under FOIA, it should not seek them again in discovery. Bay Area Crane - Hoist Company, Inc., supra, (Board directed appellant to avoid requesting documents under Rule 15 that it possessed from its FOIA request).

2. The Government requests and obtains information prior to the contracting officer's final decision.

a. DCAA audits.

b. Additional evidence supporting the contractor's claim.

B. Timing of Discovery.

1. The complaint must be filed before discovery may start. ASBCA Rules 14, 15.

2. Methods of discovery may be used in any sequence. However, this is the typical framework for contract litigation:

a. Written interrogatories.

b. Document production.

c. Depositions.

d. Requests for admissions.

C. Rules.

1. Armed Services Board of Contract Appeals (ASBCA).

a. Rules 14 (Discovery -Depositions), 15 (Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents), 21 (Subpoenas), and 35 (Sanctions).

b. The ASBCA applies the Federal Rules of Civil Procedure (Fed. R. Civ. P.) when the Board rules are silent on a procedural issue. **Practice Tip**: If you can't find a Board case concerning a discovery issue, cite Federal court cases interpreting the Federal Rules

c. The rules encourage voluntary discovery. Rule 14(a).

(1) Once the pleadings are filed, discovery is typically left to the parties to control.

(2) A judge, once assigned to a case, typically holds a conference at which the parties discuss discovery needs. The judge will issue an order establishing deadlines.

d. Protective orders.

(1) The Board may make an order to protect a party or person from annoyance, embarrassment, or undue burden or expense.

(2) The order may include limits on scope, method, time, and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

e. Board rulings on discovery issues. Most discovery rulings are non-binding, unpublished, interlocutory decisions of an individual judge.

2. Court of Federal Claims (COFC).

a. Rules (RCFC) 26-37 (Depositions and Discovery).

b. The rules provide for Discovery conferences. RCFC 26(f). The judge may direct the parties to appear at a conference any time after commencement of the action, and may hold a conference on proper motion by the attorney for any party.

c. The COFC may issue protective orders. RCFC 26(c).

3. General Accounting Office (GAO).

a. Generally. 4 C.F.R. § 21.3(c) sets forth that in response to a GAO protest, the agency is required to provide GAO, the protester, and any intervenors a complete written report responding to the protest, including all relevant documents, or portions of documents, and an explanation of the agency's position. 4 C.F.R. § 21.3(c). The report generally includes a statement of the relevant facts signed by the contracting officer, a memorandum of law explaining the agency's position in terms of procurement law, and a list and a copy of all relevant documents, or portions of documents, not previously furnished. 4 C.F.R. § 21.3(d).

b. The GAO encourages voluntary discovery. Agencies are encouraged to voluntarily release to the parties documents which are relevant to the protest prior to the filing of the agency report. Documents provided to the parties prior to the filing of the agency report or documents which are otherwise made available to the parties, for example, by allowing the parties to review documents on site at the agency prior to the filing of the report, need not be produced in the copy of the report provided to the parties. 4 C.F.R. § 21.3(c).

c. Protester Documents. Occasionally, the agency may be aware of the existence of relevant documents that only the protester possesses. In appropriate cases, the agency may request that the protester produce those documents. 4 C.F.R. § 21.3(d). If GAO agrees that the documents are relevant, it may ask the protester to provide a copy of the documents to GAO and the other parties, subject to the terms of any protective order.

d. Document Disputes

(1) GAO requires that at least 5 days prior to the filing of the report, in cases in which the protester has requested in its protest specific documents material to the protest, that the agency prepare a list of those documents, or portions of documents, which it has previously released or intends to produce in its report, and of the documents which it intends to withhold and the reasons for the withholding. 4 C.F.R. § 21.3 (c). Objections to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed with GAO and all other parties within 2 days of receiving the list. Id.

(2) Upon the request of a party, GAO will decide whether the contracting agency must provide any withheld documents, or portions of documents, and whether this should be done under a protective order. When withheld documents are provided, the protester's comments on the agency report shall be filed within the original comment filing period unless GAO determines that an extension is appropriate. 4 C.F.R. § 21.3(h).

e. Protective Orders (4 C.F.R. § 21.4(a)).

(1) At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protester through counsel, it is the responsibility of protester's counsel to request that a protective order be issued and to submit timely applications for admission under that order.

(2) If no protective order has been issued, the agency may withhold from the parties those portions of its report which would ordinarily be subject to a protective order. GAO will review in camera all information not released to the parties.

(3) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by submitting an application to GAO, with copies furnished simultaneously to all parties. Objections to an applicant's admission shall be raised within 2 days after receipt of the application, although GAO may consider objections raised after that time.

III. DISCOVERY PLANS.

A. Goals of a Discovery Plan. Offensively: Identify what you need to resolve the case. Defensively: Identify what the other side is (and is not) entitled to receive in discovery. The Discovery Plan is a significant piece of a trial attorney's overall "Business Plan" for litigating the case.

1. See what you have before asking for it from the other side. Inspection of government documents and discussions with key employees is an essential first step.

2. The effort expended in producing a quality contracting officer's final decision can minimize the need for formal discovery.

a. What documents were compiled to address the claim? These documents should be in the Rule 4.

b. Has a DCAA audit been completed?

c. Did the contracting officer discuss issues with key government employees? This information should be in the Trial Attorney's Litigation File (TALF).

B. Factors. The plan varies in each case and is dependent upon the following factors:

1. Dollar value of the case;

2. Information already in the Government's possession;

3. Number of issues;

4. Government or contractor claim.

C. Timing.

1. Optimally you will develop your plan while answering the complaint. You can amend as required during the course of litigation.

2. The trial attorney should coordinate with the field attorney and contracting officer.

a. Identify Government employees who can fill in information gaps, or identify contractor sources for the information.

b. Discuss the projected time to be invested in discovery.

c. Discuss the projected costs of discovery.

3. The Government should attempt to serve its first set of written discovery on or about the date the answer is filed. At a minimum, the request should include interrogatories and requests for document production.

IV. INTERROGATORIES.

A. Purpose. To identify deponents and location of documents.

B. Drafting and Responding.

1. Drafting Tips.

a. There is no limit on the number of interrogatories a party may serve on its opponent.[1] However, only ask for what you need.

b. Seek factual information. Avoid questions that seek opinions or legal conclusions.

c. Don't use legal terms such as "relevant," as in "provide all relevant documents."

d. Seek only one item of information per interrogatory.

e. Use words and phrases such as "identify," "state the location of," and "list."

f. Instructions and definitions.

(1) If you use, make sure the terms used in the interrogatories are consistent with those in the instructions and definitions.

(2) You may wish to make the instructions available on request. Some parties will answer your interrogatories without requiring instructions.

g. Use subheadings to organize your Interrogatories. For example, "The Complaint" and "The Claim." Reference statements made in the claim and the complaint when asking questions.

h. When seeking the identity of individuals, request current addresses and phone numbers.

[1] The Fed. R. Civ. P 33(a) limits parties to twenty-five (25) interrogatories, to include discrete subparts.

i. Request production of documents at the same time you serve interrogatories.

2. Responding.

a. ASBCA Rule 15. Written interrogatories are to be answered separately in writing, signed under oath and answered or objected to within 45 days after service. The ASBCA may allow a shorter or longer time.

(1) Separately in writing. You can use one of two formats.

(a) Response only.

(b) Interrogatory and response.

(2) Objections.

(a) The burden is on the objecting party to establish a basis for withholding discovery.

(b) Objections should be specific and supported by detailed explanations.

(c) Examples of common objections:

(i) Privileged or otherwise protected material requiring a protective order.

(ii) Relevance.

(iii) Unduly burdensome (i.e., the burden is disproportionate to the need).

(3) Answers.

(a) Option to produce business records. If the answer may be derived from a business record, and the burden of deriving the answer is substantially the same for both parties, it is sufficient to identify the records from which the answer may be derived. Fed. R. Civ. P. 33(c).

(b) The signature of the attorney constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made. Fed. R. Civ. P. 26(g)(1).

(c) Duty to supplement. Fed. R. Civ. P. 26(e) requires supplementation of responses in the following instances:

(i) When the discovery requested the identity and location of persons having knowledge of discoverable matters;

(ii) When the discovery requested the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert witness is expected to testify, and the substance of the expert witness' testimony;

(iii) When the party learns that the response is in some material respect incomplete or incorrect and the additional or corrective information has not been made known through the discovery process or in writing;

(iv) When the court (Board) imposes an order, the parties have an agreement, or at any time prior to trial through new requests for supplementation of prior responses. See W.M. Schlosser Company, Inc., ASBCA No. 44778, 96-2 BCA ¶28,587 (Government timely notified Appellant of identity of expert witness on Board ordered deadline).

(4) Enlargement of time to respond.

(a) Parties typically work out extensions between themselves.

(b) If the opponent does not agree to an extension of time, the requesting party should seek an extension from the Board.

(5) The responses must be signed under oath. Northern Pacific Contractors, Inc., ASBCA No. 49350, 97-1 BCA ¶ 28,769 (Board threatened to dismiss appeal with prejudice for failure to prosecute if appellant failed to submit its answers signed under oath).

(6) It is not necessary to submit interrogatories or answers to the Board, unless a party wishes to introduce into evidence or have the Board rule on adequacy of a response.

b. COFC. RCFC 33(a).

(1) The COFC requires responses to interrogatories within 30 days after service. It also may allow a shorter or longer time.

(2) The answers are to be answered separately and fully in writing under oath.

(3) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

C. Wave Concept.

1. Review the responses to the first set of interrogatories.

2. Quickly send a letter to the opponent concerning questions that were not answered satisfactorily.

3. Submit successive rounds of interrogatories as necessary.

4. Keep the interrogatories in numerical order. If your first set of interrogatories ended with number 30, start the second set with number 31.

D. Use of Interrogatories.

1. Introduce interrogatory responses as part of the record upon which the Board will decide the case. Rule 13(a). They are especially useful in record submissions (without a hearing) under Rule 11.

2. A response to an interrogatory can be dispositive. See Polote Corporation, ASBCA No. 31115, 86-1 BCA ¶ 18,640 (Government bound by initial admission to interrogatory despite supplementing response three days before hearing).

3. Responses to interrogatories can be considered in deciding a motion for summary judgment. Adamation, Inc., ASBCA No. 22495, 80-1 BCA ¶ 14,385 (Board granted motion after finding that Appellant's responses established that it had provided no notice to the government of its asserted claims prior to final payment).

V. PRODUCTION OF DOCUMENTS OR OBJECTS.

A. Scope.

1. Serve only on a party. Use a subpoena duces tecum for non-parties. Rule 21(a)(iii).

2. Third-party documents within the Government.

   a. The contracting officer may have to obtain relevant documents from other agencies.

   b. Request for the documents should be specific.

3. Equally accessible documents. These will not generally be required to be disclosed or produced.

B. Drafting Pointers.

1. Documents that may be relevant:

   a. Financial records;

   b. Bid or proposal documents;

   c. Daily logs or notebooks;

   d. Purchase orders and invoices.

2. Use an expansive definition of document, e.g. include drafts, nonidentical copies, attachments, annexes, appendices, enclosures, facsimile documents, software, databases, tape recordings, photographs.

3. Request that appellant provide a privileged document log that describes all documents withheld.

4. Don't forget to ask for electronic media. You may need the help of a consultant to find and review this data.

C. Production vs. Access.

1. Production.

a. Used mostly in small document and pro se cases.

b. Possessor of documents makes copies of the requested documents and sends to requesting party.

2. Access.

a. This is the likely route when dealing with many documents.

b. If you are prepared, this is preferable to having the other side produce documents.

c. The parties should prepare an agreement in advance, addressing the following points:

(1) Where the documents will be made available;

(2) The period of time the documents will be available;

(3) Who will be reviewing the documents;

(4) How the documents will be reproduced;

(5) Who will pay the costs of reproduction;

(6) What to do in case of inadvertent disclosure of privileged or protected documents.

D. Screening Documents.

1. Government Documents.

a. Before granting access to the appellant, the documents must be screened by counsel. Disclosure of privileged documents, even inadvertently, may result in waiver of the privilege. See Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir. 1990). But see National Helium Corp. v. U.S., 219 Ct. Cl. 612 (1979)(no per se waiver rule for inadvertent disclosure).

(a) An inadvertent disclosure agreement can avoid waiver of a privilege.

(b) Best to get a bilateral agreement, but can put it in a letter to give notice to the other party.

b. Withhold all privileged documents.

(1) Look for documents marked with a protective legend. However, not all documents requiring protection will be so marked, nor will all documents so labeled be entitled to protection.

(2) Look for documents involving attorneys. However, not all correspondence, such as correspondence concerning routine business matters, will receive protection.

(3) For purposes of work product, the ASBCA does "not view the contracting officer's final decision as the automatic line of demarcation between routine contract administration and preparation for litigation." B.D. Click Co., Inc., ASBCA Nos. 25,609 and 25,972, 83-1 BCA ¶ 16,328.

(4) Opinion work product receives greater protection than fact work product. AT&T v. General Services Administration, GSBCA No. 14732, 1999 GSBCA LEXIS 232.

(5) Some documents may have to be produced after redaction. Sierra Rock v. Regents of Univ. of California, EBCA No. C-9705223, 98-2 BCA ¶ 30,083 (ordering disclosure of certain documents after redacting portions subject to the attorney-client privilege).

c. Withhold third-party proprietary documents until the parties obtain a protective order.

d. Prepare a privileged document log that includes:

(1) Identity of individuals party to the communication;

(2) Date of the document;

(3) Enough information to allow for independent evaluation of the claimed privilege (attorney-client, work product, etc.).

e. Disputed documents may require the Board's in camera review.

E. Reviewing Appellant's Documents.

1. Develop a plan.

a. Identify the quantity of documents.

b. Identify who will review the documents (e.g., contracting officer or specialist, engineers, auditors, experts).

c. Provide guidance on what to look for.

d. Identify the most efficient way to review and tag documents for copying.

2. Methods of Conducting Document Discovery.

a. Manual.

(1) Method most often used.

(2) Parties look at documents and tag with tape flags, BATE stamp, or similar method.

(3) Ensure you have a list describing the documents marked, to compare to the documents actually received.

b. Automated.

(1) Useful when trying a large document case.

(2) Requires special equipment and/or personnel.

(3) Consider hiring a commercial firm to do this.

(4) Can scan full text of documents, or code a document (by issue, witness name, etc.)

3. Receipt of Documents.

a. Compare documents received with documents marked.

b. Decide whether to pursue withheld documents after reviewing appellant's rationale for withholding.

c. Decide which documents you will use to conduct depositions, supplement the Rule 4 file, introduce at the hearing, or archive.

VI. REQUESTS FOR ADMISSIONS.

A. Purpose. To expedite trial by narrowing the issues to be litigated. Rust Mfctg., Inc., ASBCA No. 27511, 84-3 BCA ¶ 17,518.

B. Scope.

1. Requests for Admissions should be matters of fact.

2. A proper request can also seek admission of the authenticity of a document.

3. Facts which are in real dispute are not proper subjects for a Request for Admission. Rust Mfctg., Inc., ASBCA No. 27511, 84-3 BCA ¶ 17,518.

4. Require the answering party to state reasons for its denial of a Request for Admission, and to produce any documents relied upon in making the denial.

C. Examples.

1. Admit or deny that Contract DABA60-99-C-0001 required XYZ Corporation to deliver 50 widgets to Fort Swampy on 1 July 2000.

2. Admit or deny that XYZ Corporation failed to deliver 50 widgets under Contract DABA60-99-C-0001 to Fort Swampy on 1 July 2000.

D. Time for Response.

1. ASBCA.

a. Responses or objections are due within 45 days of service, or a shorter or longer time as decided by the Board.

b. Failure to timely respond could result in the admission of the factual statements in the requests. The party seeking the sanction must show prejudice due to the late response. Rust Mfctg., Inc., ASBCA No. 27511, 84-3 BCA ¶ 17,518 (Board refused to deem facts admitted where government was one month late in responding and the appellant showed no prejudice).

2. COFC. Responses or objections are due within 30 days of service, or a shorter or longer time as decided by the Court.

VII. REMEDIES.

A. Motions and Board Orders.

1. Motions to Compel.

a. Requests Board to order the party to answer discovery or produce documents.

b. If the Board issues an order, the party must comply with the order.

2. Motion to Dismiss for Failure to Prosecute. ASBCA Rule 31.

a. A party is required under ASBCA Rule 31 to take steps showing its intention to prosecute or defend the appeal.

b. Failure of appellant to respond to notices or comply with orders from the Board should lead to a motion to dismiss.

c. The Board will generally allow the party an opportunity to cure the defect or show cause before dismissing the case with prejudice. Failure to respond at this stage can lead to dismissal. Ellis Constr. Co., Inc., ASBCA No. 50091, 98-1 BCA ¶ 29,552.

B. Sanctions.

1. ASBCA Rule 35. "If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal."

2. A board order is not a prerequisite for the application of sanctions. Charles G. Williams Constr., Inc., ASBCA No. 33766, 89-2 BCA ¶ 21,733 (sanctions appropriate where Air Force falsely denied that it conducted a technical evaluation of appellant's claims).

3. Types of sanctions.

   a. Dismiss case with prejudice. This sanction is a drastic step which is employed only in the most extreme cases. Ellis Constr. Co., Inc, supra; Tech-Tron Constructors, ASBCA No. 46367, 97-1 BCA ¶ 28,746 (Appellant failed to submit affidavit with response to motion).

   b. Costs. The Board does not have the authority to impose monetary sanctions. E-Systems, Inc., ASBCA No. 46111, 97-1 BCA ¶ 28,975.

   c. Bar offending party from using withheld evidence. Charles G. Williams Constr., Inc., supra.

   d. Preclude party from presenting evidence that was subject of interrogatory. American Ballistics Co., Inc., ASBCA No. 38578, 92-3 BCA ¶ 25,056.

   e. If the evidence sought through an interrogatory is first disclosed at hearing, the party seeking the evidence should move to strike. Grumman Aerospace Corp., ASBCA Nos. 46834, 48006, 51526, 1999 ASBCA LEXIS 174 (Board declined to strike hearing testimony).

   f. Treat unanswered requests for admissions as admitted. American Ballistics Co., Inc, supra.

g. Adverse inferences due to lost or destroyed documents. Nation-Wide Check v. Forest Hills Distributors, 692 F.2d 214 (1st Cir. 1982); Hughes Aircraft Company, ASBCA No. 46321, 97-1 BCA ¶ 28,972; Dalmo Victor Division of General Instrument Corporation, ASBCA No. 39718, 92-3 BCA ¶ 25,176.

C. GAO's Remedies.

1. GAO has no authority to issue orders compelling discovery of documents. Neither does the GAO have the authority to sanction agencies or protesters for fails or refusing to provide relevant documents. See generally 4 C.F.R. § 21. The GAO can only request that agencies provide to the protester those documents relevant to the protest.

2. The GAO may draw an unfavorable inference regarding the content of documents that an agency fails to provide a protester. HLJ Mgmt. Group, Inc.-- Recon., B-225843.5**,** Mar. 6, 1989, 89-1 CPD ¶ 237.

3. The violation of the terms of a protective order may result in the imposition of such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the individual's practice before GAO. 4 C.F.R. § 21.4 (d).

VIII. CONCLUSION.